

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 30, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LEILANI B.,¹

Plaintiff,

v.

MARTIN O'MALLEY, Commissioner of
Social Security,

Defendant.

No. 1:23-cv-3206-EFS

**ORDER REVERSING THE ALJ'S
DENIAL OF BENEFITS, AND
REMANDING FOR AWARD OF
BENEFITS**

Due to physical and mental impairments, Plaintiff Leilani B. claims she is unable to work fulltime and applied for supplemental security income benefits. She appeals again—for the third time—the Administrative Law Judge's (ALJ) denial of benefits on the grounds that the ALJ erred at step two, failed to properly evaluate the medical opinions and Plaintiff's symptom reports, and failed to properly assess Plaintiff's residual functional capacity. As is explained below, the ALJ again erred:

¹ For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

1 at step two and when analyzing the medical opinions. This matter is remanded for
2 an award of benefits.

3 I. Background

4 At the age of 44, Plaintiff applied for benefits under Title 16, claiming
5 disability beginning on March 24, 2016, based on fibromyalgia, disc replacement
6 surgery, panic attacks, anxiety, post-traumatic stress disorder (PTSD), and chronic
7 pain in her spine, legs, and arms.² After the agency denied benefits,³ an
8 administrative hearing was held before ALJ Mark Kim in 2018.⁴ At the hearing,
9 Plaintiff testified that she has a ninth-grade education, experienced sexual abuse
10 and neglect, was in a car accident years prior that caused back pain, and was
11 divorced.⁵ She stated that she lived with her adult son, gets anxious around other
12 people, received mental health treatment, and took medication for her pain and
13 fibromyalgia, although the medication did not sufficiently relieve her pain to allow
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16 ² AR 179–90. At a later date, Plaintiff filed a Title 2 claim; however, at the August
17 2023 hearing, Plaintiff withdrew the Title 2 claim. AR 939–68, 1636. In addition,
18 Plaintiff filed a duplicative Title 16 claim in 2021, which was consolidated with the
19 initial claim. AR 1597.

20 ³ AR 73–95, 99–114.

21 ⁴ AR 35–65.

22 ⁵ *See, e.g.*, AR 41–51, 503, 1084–85, 1435, 1544.
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1 her to work.⁶ She testified that gets numbness in her arms and in her legs if she
2 stands or sits too long (about 15–60 minutes).⁷ She gets about 3–4 hours of sleep a
3 night, lays down most of the day, and has difficulty focusing and remembering.⁸

4 A month after the hearing, the ALJ denied Plaintiff's claim.⁹ Plaintiff
5 requested review of the ALJ's decision by the Appeals Council, which denied
6 review. Plaintiff then filed a lawsuit in district court.¹⁰ Magistrate Judge Mary
7 Dimke granted summary judgment in Plaintiff's favor and remanded the matter
8 back to the Commissioner for further proceedings.¹¹

9 On remand, a second administrative hearing was held by telephone in May
10 2021 during which Plaintiff, a medical expert, and a vocational expert testified.¹²
11 Plaintiff testified that she lives with her son, his wife, a grandson, and an in-law.¹³
12 She said that she is unable to reach above her shoulders and has pain daily in her

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14 ⁶ AR 41–48.

15 ⁷ AR 48.

16 ⁸ AR 50–53.

17 ⁹ AR 12–34.

18 ¹⁰ AR 1–6, 780–96. *See* E.D. Wash. no. 1:19-cv-3189-MKD.

19 ¹¹ AR 797–831.

20 ¹² AR 729–79. Before the second hearing, Plaintiff filed additional applications for
21 benefits; these claims were consolidated with her initial application. AR 696.

22 ¹³ AR 740–41.

1 low back, experiences both shooting pains and numbness in her legs, and
2 experiences numbness in her hands and arms.¹⁴ She spends the majority of the
3 days laying down or reclining; and she has problems sleeping and this impacts her
4 ability to function the next day. She testified that she forgets things and suffers
5 from migraines, which require her to stay in a dark and quiet room, about once a
6 week.¹⁵

7 Later that month, ALJ M.J. Adams issued a decision denying Plaintiff's
8 claim.¹⁶ Plaintiff appealed the denial to district court.¹⁷ The parties agreed the ALJ
9 erred, and the district court remanded the matter back to the Commissioner.¹⁸

10 In August 2023, a third administrative hearing was held before ALJ C.
11 Howard Prinsloo by telephone, at which Plaintiff and a vocational expert
12 testified.¹⁹ Plaintiff testified to problems with her legs, including numbness,
13 swelling, and pooling of blood.²⁰ She stated that she had been struggling with low
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16 ¹⁴ AR 742–44.

17 ¹⁵ AR 745–49.

18 ¹⁶ AR 693–728.

19 ¹⁷ AR 1709–13. *See* E.D. Wash. no. 1:21-cv-3102-MKD.

20 ¹⁸ AR 1714–19, 1738–40.

21 ¹⁹ AR 1631–62.

22 ²⁰ AR 1639–40, 1644.

1 oxygen levels and she was put on oxygen the month prior.²¹ She relayed that she
2 has been using a cane when she walks because she gets dizzy and winded.²² She
3 testified that she is unable to fully close her hands, as she lacks full strength; and
4 that she stopped driving about two years ago because she gets dizzy and can have
5 panic attacks when she is driving.²³ She testified that she is no longer on
6 antidepressants due to changes in her mental-health care providers, she
7 experiences forgetfulness, and her anxiety makes it difficult to leave the house and
8 be social.²⁴

9 The ALJ issued a decision denying benefits.²⁵ The ALJ found Plaintiff's
10 alleged symptoms were inconsistent with the medical evidence and other
11 evidence.²⁶ The ALJ considered the lay statements from Plaintiff's son.²⁷ As to the
12 physical-health medical opinions, the ALJ:

15 ²¹ AR 1641–42, 1648.

16 ²² AR 1642.

17 ²³ AR 1643–44.

18 ²⁴ AR 1645–46.

19 ²⁵ AR 1594–1630. Per 20 C.F.R. § 416.920(a)–(g), a five-step evaluation determines
20 whether a claimant is disabled.

21 ²⁶ AR 1603–09.

22 ²⁷ AR 1616.

- 1 • found persuasive the reviewing opinions of G. Bugg, MD; JD Fitterer,
2 MD; Tim Schoefield, MD; Christine Harmond, MD; Robert Hander,
3 MD; and Erin Madden, MD.
- 4 • gave partial weight to the consultative opinion of William Drenguis,
5 MD.
- 6 • gave no weight to the statements by Alex Stone, PA.
- 7 • gave some weight to the treating opinions of Roger Wagner, MD, and
8 Beth McManis, ARNP.
- 9 • found the treating opinion of Huilin Sun, ARNP, not persuasive.²⁸

10 As to the mental-health medical opinions, the ALJ:

- 11 • did not assign weight to the reviewing opinions of Renee Eisenhauer,
12 PhD; Jan Lewis, PhD; Andrew Forsyth, PhD; and Steven Haney, MD.
- 13 • gave partial weight to the evaluating opinion of Alexander Patterson,
14 PsyD; and the reviewing opinion of Jay Toews, EdD.
- 15 • gave little weight to the evaluating opinion of Thomas Genthe, PhD.

19 ²⁸ AR 1610–11. The ALJ appears to have used the standards in 20 C.F.R. § 416.927
20 for medical opinions issued prior to March 27, 2017, and the standards in 20 C.F.R.
21 § 416.920c for medical opinions issued after that date, even though Plaintiff filed
22 her initial Title 16 claim in 2016.

- 1 • gave no weight to the reviewing opinions of Rita Flanagan, PhD;
2 Preston Davis, PsyD; Luci Carstens, PhD, PS; and Renee Eisenhauer,
3 PhD.
- 4 • gave no weight to the evaluating opinions of R.A. Cline, PsyD;
5 Tasmyn Bowes, PsyD; and JK Zhang, PsyD.

6 As to the sequential disability analysis, the ALJ found:

- 7 • Step one: Plaintiff had not engaged in substantial gainful activity
8 since March 16, 2016, the alleged onset date.
- 9 • Step two: Plaintiff had the following medically determinable severe
10 impairments: migraine headaches, degenerative disc disease of the
11 spine, fibromyalgia, obesity, depressive disorder, anxiety disorder,
12 personality disorder, PTSD, and substance use disorder.
- 13 • Step three: Plaintiff did not have an impairment or combination of
14 impairments that met or medically equaled the severity of one of the
15 listed impairments.
- 16 • RFC: Plaintiff had the RFC to perform light work except she is limited
17 to:
18 no climbing of ladders, ropes, or scaffolds, but can
19 occasionally climb ramps and stairs, balance, stoop, kneel,
20 crouch, or crawl. She must avoid exposure to vibration or
21 concentrated exposure to hazards. She can understand,
22 remember, and carry out simple instructions and exercising
23 [sic] simple workplace judgment with occasional changes in
 the work environment. The claimant is capable of occasional
 coworker interaction with occasional or less interaction or
 contact with the public.

- Step four: Plaintiff has no past relevant work.
- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could perform work that exists in significant numbers in the national economy, such as electronics accessory assembler, marker, and housekeeping cleaner.²⁹

Plaintiff timely requested review of the ALJ's decision.

II. Standard of Review

The ALJ's decision is reversed "only if it is not supported by substantial evidence or is based on legal error" and such error impacted the nondisability determination.³⁰ Substantial evidence is "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³¹

²⁹ AR 1597–1618.

³⁰ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). *See* 42 U.S.C. § 405(g); *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)), *superseded on other grounds by* 20 C.F.R. § 416.920(a) (recognizing that the court may not reverse an ALJ decision due to a harmless error—one that "is inconsequential to the ultimate nondisability determination").

³¹ *Hill*, 698 F.3d at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)). *See also* *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must consider the entire record as a whole, weighing both the evidence that

III. Analysis

Plaintiff argues the ALJ erred by not properly assessing all medically determinable and severe disorders, the medical opinions, and her symptom testimony. The Commissioner argues the ALJ's nondisability finding is supported by substantial evidence. As is explained below, the ALJ erred at step two and when evaluating the mental-health medical opinions. The ALJ's continued errors support a remand for payment of benefits, after crediting the mental-health opinions that were not properly evaluated.

A. Step Two (Severe Impairment): Plaintiff establishes consequential error.

Plaintiff argues that the ALJ erred at step two by not properly assessing all medically determinable and severe disorders, namely conditions affecting her legs (venous insufficiency, edema, and statis dermatitis) and COPD. The Commissioner argues that the ALJ reasonably identified the severe impairments and that even if Plaintiff establishes step-two error, Plaintiff cannot show resulting harm.

At step two, the ALJ determines whether the claimant suffers from a "severe" impairment, i.e., one that significantly limits her physical or mental

supports and the evidence that detracts from the Commissioner's conclusion," not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]").

1 ability to do basic work activities.³² This involves a two-step process: 1)
2 determining whether the claimant has a medically determinable impairment and
3 2), if so, determining whether the impairment is severe.³³ As to the first prong,
4 neither a claimant's statement of symptoms, nor a diagnosis, nor a medical opinion
5 sufficiently establishes the existence of an impairment.³⁴ Rather, "a physical or
6 mental impairment must be established by objective medical evidence from an
7 acceptable medical source," and objective medical evidence means "signs,
8 laboratory findings, or both."³⁵ As to the second prong, the severity determination
9 is discussed in terms of what is *not* severe.³⁶ A medically determinable impairment
10 is not severe if the "medical evidence establishes only a slight abnormality or a
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12 ³² 20 C.F.R. § 416.920(c).

13 ³³ *Id.* § 416.920(a)(4)(ii).

14 ³⁴ *Id.* § 416.921.

15 ³⁵ *Id.* §§ 416.921, 416.902(k). Signs means one or more anatomical, physiological, or
16 psychological abnormalities that can be observed, apart from [a claimant's]
17 statements (symptoms)." *Id.* § 416.902(l). *See also* SSR 85-28 at *4 ("At the second
18 step of sequential evaluation ... medical evidence alone is evaluated in order to
19 assess the effects of the impairment(s) on ability to do basic work activities."); 3
20 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical evidence (2019).

21 ³⁶ *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); Soc. Sec. Ruling (SSR) 85-
22 28 at *3 (1985).
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1 combination of slight abnormalities which would have no more than a minimal
2 effect on an individual's ability to work.”³⁷ Because step two is simply to screen out
3 weak claims,³⁸ “[g]reat care should be exercised in applying the not severe
4 impairment concept.”³⁹ Moreover, step two “is not meant to identify the
5 impairments that should be taken into account when determining the RFC” as step
6 two is meant *only* to screen out weak claims, whereas the crafted RFC must take
7 into account all impairments, both severe and non-severe.⁴⁰

8 1. Lower leg impairments

9 Plaintiff argues the ALJ erred by failing to find that Plaintiff's venous
10 insufficiency, edema, and stasis dermatitis constituted a severe impairment. In
11 response, the Commissioner argues that substantial evidence supports the ALJ's
12 decision not to find that Plaintiff's leg swelling was a severe impairment and,
13 regardless, that the swelling does not require any further accommodation beyond
14 the RFC's limitation to light work with no climbing of ladders, ropes, or scaffolds,
15 and only occasional climbing of ramps and stairs, balancing, stooping, kneeling,
16 crouching, or crawling.

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19 ³⁷ See SSR 85-28 at *3.

20 ³⁸ *Smolen*, 80 F.3d at 1290.

21 ³⁹ SSR 85-28 at *4.

22 ⁴⁰ *Buck v. Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir. 2017).

1 The ALJ did not mention Plaintiff's lower leg impairments of venous
2 insufficiency, edema, or statis dermatitis in his step-two analysis, mentioning only:

3 [o]ther impairments are mentioned in the record from time to time,
4 such as sleep apnea, but they did not cause significant limitations in
5 functioning, or did not last for a continuous period of 12 months. Any
6 such impairment is not severe. However, any non-severe impairment
7 is taken into account in assessing the claimant's residual functional
8 capacity.⁴¹

9 Instead, the ALJ mentioned Plaintiff's leg swelling later in the five-step sequential
10 analysis. The ALJ's references to Plaintiff's lower leg conditions reflect that the
11 ALJ considered them to effect Plaintiff only mildly and sporadically:

- 12 • "For instance, although she occasionally appeared in mild pain,
13 demonstrated limping gait, and exhibited lower extremity swelling,
14 weakness, and sensation loss, most records show largely benign
15 physical presentation."⁴²
- 16 • "At times, she had non-pitting edema in her lower leg bilaterally with
17 tenderness."⁴³

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20 ⁴¹ AR 1600.

21 ⁴² AR 1606.

22 ⁴³ AR 1606.

- “[E]ven with allegations of leg swelling for the last year or so, the claimant asserted need for a cane with frequent observed falls, but did not bring her cane with her to all medical appointments.”⁴⁴

Yet, a fair and full review of the medical record reflects that the ALJ’s failure to find a lower leg severe impairment is not supported by substantial evidence. The medical record reflects that Plaintiff began reporting problems with leg swelling in August 20, 2015. Although no edema was observed, the treating provider referred Plaintiff for a vascular evaluation.⁴⁵ Thereafter, amidst medical records noting normal gait and leg strength and no edema, other medical records reflect abnormal signs concerning Plaintiff’s lower extremities:

- December 15, 2016: observed with decreased sensation to pinprick in her legs, walking with a limp and shuffling gait.⁴⁶
- May 31, 2017: observed with +2 left pedal edema and +1 right pedal edema. “Encouraged pt. to elevate feet and wear compression stockings. Encouraged pt. to exercise such as walking or water

⁴⁴ AR 1606.

⁴⁵ AR 343. Plaintiff did not have the vascular ultrasound until 2023. AR 2213–15, 2342.

⁴⁶ AR 465.

1 aerobics/walking. If this does not help, pt given a Rx for Lasix. Pt. to
2 use the medication x 3 days.”⁴⁷

- 3 • November 16, 2017: observed with no edema or significant varicosities
4 but gait affected by left leg limp, laxity of Valgus stress left knee, and
5 positive McMurray’s left knee, and seemed to be in mild pain.⁴⁸
- 6 • January 24, 2019: observed with an antalgic gait and mild pain.⁴⁹
- 7 • March 19, 2019: no edema or significant varicosities but antalgic gait
8 and seems to be in mild pain and recommended use of a single point
9 cane due to left lower leg weakness.⁵⁰
- 10 • June 13, 2019: observed with grade 2 edema of the left leg extending
11 above the ankle, and 2+ pitting edema of the right ankle extending
12 above the ankle.⁵¹

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16 ⁴⁷ AR 611–12.

17 ⁴⁸ AR 650; *see also* AR 624–47, 1149–1200 (left leg limp and mild pain continuing
18 through October 2018).

19 ⁴⁹ AR 1123–30.

20 ⁵⁰ AR 1109; *see also* AR 1387–1407 (observed with antalgic gait in April and May
21 2019).

22 ⁵¹ AR 1377.

- 1 • August 9, 2019: observed with antalgic gait.⁵²
- 2 • February 23, 2021: observed to be walking slowly.⁵³
- 3 • March 16, 2021: observed with bilateral edema in the lower
- 4 extremities.⁵⁴
- 5 • June 14, 2021: observed with 1+ pitting edema, swelling, and
- 6 varicosities in bilateral lower extremities. Recommended prescription
- 7 for Lasix and compression stockings.⁵⁵
- 8 • August 23, 2021: observed with trace bilateral extremity edema.⁵⁶
- 9 • August 12, 2022: observed with an unsteady gait, non-pitting bilateral
- 10 edema, and stasis ulcer (bilateral lower legs, red and swollen, whitish
- 11 oozing at left calf). Recommended compression of lower legs and
- 12 elevation for at least one hour a day and noted concern about potential
- 13 heart failure.⁵⁷

16 ⁵² AR 1356; *see also* AR 1327–53 (observed with slightly antalgic gait in August
17 2019, September 2019, and October 2019).

18 ⁵³ AR 1430–31.

19 ⁵⁴ AR 1577.

20 ⁵⁵ AR 2042–44.

21 ⁵⁶ AR 2021.

22 ⁵⁷ AR 2520–24.

- 1 • August 19, 2022: observed with an unsteady gait, non-pitting bilateral
- 2 edema, and statis ulcer of the bilateral lower legs, although the
- 3 redness and swelling were less severe than the week prior.⁵⁸
- 4 • October 21, 2022: observed with statis dermatitis of bilateral lower
- 5 legs, along with swelling of bilateral lower extremities.⁵⁹
- 6 • March 17, 2023: observed with non-pitting bilateral edema;
- 7 ultrasound of lower extremities ordered.⁶⁰
- 8 • April 19, 2023: ultrasound reveals superficial venous reflux/valvular
- 9 incompetence of the bilateral lower extremities but no deep venous
- 10 valvular insufficiency.⁶¹
- 11 • June 2023: “patient is significantly symptomatic due to lymphedema
- 12 with skin weeping, erythema and taut edema causing pain and
- 13 decreased mobility. . . . Once leg swelling is controlled and reduced
- 14 with the lymphedema treatment, she can be fit for compression
- 15 stockings to aid in lifetime management of chronic edema. She could
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19 ⁵⁸ AR 2512.

20 ⁵⁹ AR 2490–91.

21 ⁶⁰ AR 2412–14.

22 ⁶¹ AR 2342.

1 also benefit from lymphedema pumps for long-term management of
2 significant leg swelling”⁶²

3 While an ALJ need not address every piece of evidence, an ALJ “may not
4 ignore significant probative evidence that bears on the disability analysis.”⁶³ By
5 focusing on the medical records that reflected normal gait, lower leg strength, and
6 no edema, the ALJ erred in his step-two analysis. The objective medical evidence
7 establishes that Plaintiff suffers abnormalities from venous insufficiency, edema,
8 and stasis dermatitis, including observed leg swelling, redness, and oozing in her
9 bilateral lower extremities. The Commissioner argues that these impairments did
10 not severely limit Plaintiff as it was merely recommended that Plaintiff wear
11 compression socks and raise her feet for one hour a day—and such restrictions do
12 not constitute more than a minimal effect on Plaintiff’s ability to work. However,
13 Plaintiff’s treating provider, when considering Plaintiff’s symptoms including
14 bilateral leg swelling, opined that Plaintiff was unable to perform even sedentary
15 work and would miss 4 or more days per month.⁶⁴ Moreover, the medical records
16 reflect that use of a cane was recommended both in 2019 and 2022.⁶⁵

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18 ⁶² AR 2214.

19 ⁶³ *Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1193 (9th Cir. 2022).

20 ⁶⁴ AR 2209–11.

21 ⁶⁵ AR 1109 (Mar. 19, 2019: “PT had recommended use of single point cane due to
22 LLE weakness, which I signed an order for in the meantime.”); AR 2509 (Aug. 19,

1 The ALJ's failure to discuss Plaintiff's lower leg impairments fairly and
 2 fully, including a complete failure to mention stasis dermatitis and varicosities,
 3 consequentially impacted the ALJ's analysis. The ALJ failed to discuss the impact
 4 these impairments have on Plaintiff's functioning, failed to discuss whether they
 5 provide support for the more limiting medical opinions, and failed to consider the
 6 interplay between these impairments and Plaintiff's other impairments. These
 7 failures effected the nondisability analysis, including the RFC and possibly the
 8 ALJ's listings and Grid analysis.⁶⁶

9 2. COPD

10 Plaintiff argues the ALJ erred by finding that her COPD was not a severe
 11 impairment. In regard to COPD, the ALJ found the medical evidence insufficient to
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13 2022: "script for a cane sent, use as needed for balance during ambulation"). *See*
 14 *also* AR 1238 (July 14, 2020: "cane").

15 ⁶⁶ *See* 20 C.F.R. § App. 2, Subpt. P, Pt. 404, § 201.00(g), Medical-Vocational
 16 Guidelines. SSR 96-9p ("Residual Functional Capacity: Maximum Sustained Work
 17 Capability Limited to Sedentary Work as a Result of Severe Medically
 18 Determinable Impairment(s),' direct a decision of 'disabled' for individuals age 50
 19 and over who are limited to a full range of sedentary work, unless the individual
 20 has transferable skills or education that provides for direct entry into skilled
 21 sedentary work, the impact of an RFC for less than the full range of sedentary
 22 work in such individuals is less critical.").

1 establish that Plaintiff suffered from COPD for longer than 12 months. The ALJ's
2 finding is not supported by substantial evidence.

3 In addition to Plaintiff's breathing issues in August 2021, which were
4 noted by the ALJ,⁶⁷ the medical record reflects that Plaintiff began having
5 breathing issues in 2017—and such continued through 2023:

- 6 • June 29, 2017: "Severe with the lowest saturation of 65% and 86 min
7 under 90% saturation. Baseline oxygen saturation was abnormal.
8 Suggesting overlap syndrome."⁶⁸
- 9 • July 27, 2017: Low oxygen saturation at 89%.⁶⁹
- 10 • August 12, 2022: observed with inspiratory wheeze in both lung
11 fields.⁷⁰
- 12 • October 21, 2022: low oxygen saturation at 90%.⁷¹

13 Although a treatment note in March 2023 states that Plaintiff's COPD is under
14 control,⁷² the next month her oxygen saturation was at 90%.⁷³ In June 2023, she

16 ⁶⁷ AR 2020.

17 ⁶⁸ AR 1081.

18 ⁶⁹ AR 479.

19 ⁷⁰ AR 2520–23.

20 ⁷¹ AR 2490.

21 ⁷² AR 2411.

22 ⁷³ AR 2293.

1 was observed with inspiratory and expiratory wheezing in all lung fields and a
2 cough with deep breathing; the provider's assessment was that COPD was a
3 "chronic condition, treatment not at goal" and "oxygen level suboptimal, with
4 elevated heart rate."⁷⁴

5 The ALJ's finding that COPD did not last for a continuous, twelve-month
6 period is erroneous.⁷⁵ Moreover, the ALJ failed to meaningfully discuss whether
7 suboptimal oxygen levels or wheezing would significantly limit Plaintiff's ability to
8 stand and/or walk up to six hours of the workday with no RFC respiratory
9 restrictions.

10 3. Consequential Errors

11 Although step-two errors are often harmless,⁷⁶ the ALJ's step-two errors
12 were not harmless. The ALJ's crafted light-work RFC did not sufficiently account
13 for Plaintiff's difficulties breathing or swelling in her lower extremities.

14 **B. Medical Opinions: Plaintiff establishes consequential error.**

15 Plaintiff argues the ALJ did not properly assess the medical opinions,
16 including opinions by ARNP McManis, ARNP Sun, Dr. Drenguis, Dr. Bowes,

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18 ⁷⁴ AR 2244.

19 ⁷⁵ 20 C.F.R. §§ 416.905(a), 416.909 (requiring the impairment to have lasted or be
20 expected to last for a continuous period of not less than 12 months).

21 ⁷⁶ See *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006);
22 *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

1 Dr. Genthe, Dr. Eisenhower, Dr. Zhang, Dr. Cline, and Dr. Carstens; and failed to
2 evaluate the reviewing opinions by Dr. Lewis, Dr. Forsyth, Dr. Haney, and
3 Dr. Eisenhower. The Commissioner argues that substantial evidence supports the
4 ALJ's evaluation of the medical opinions.

5 Because of the ALJ's step-two errors pertaining to Plaintiff's physical
6 impairments, these errors necessarily impacted the ALJ's assessment of the
7 medical opinions regarding Plaintiff's exertional abilities. The Court therefore
8 focuses its review on the ALJ's evaluation of the mental-health opinions.

9 1. Standard

10 When Plaintiff filed her initial disability application, a former version of the
11 social-security regulations regarding assessment of medical-opinion evidence
12 applied.⁷⁷ The former regulations required that medical opinions be assessed based
13 on the nature of the medical relationship the claimant had with the medical source.
14 When a treating physician's or evaluating physician's opinion is not contradicted
15 by another physician's opinion, it can be rejected only for "clear and convincing"
16 reasons, and when it is contradicted, it can be rejected for "specific and legitimate
17 reasons" supported by substantial evidence.⁷⁸ A reviewing physician's opinion can
18 be rejected for specific and legitimate reasons supported by substantial evidence,
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21 ⁷⁷ 20 C.F.R. §416.927.

22 ⁷⁸ *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
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1 and the opinion of an “other” medical source can be rejected for specific and
2 germane reasons supported by substantial evidence.⁷⁹

3 2. Reviewing opinions by State agency psychological consultants

4 The ALJ did not assign weight to four mental-health opinions by State
5 agency psychological consultants, Dr. Lewis, Dr. Eisenhower, Dr. Forsyth, and
6 Dr. Haney. These medical sources reviewed the record available to them in
7 December 2019, June 2020, March 2022, and June 2022, respectively. The ALJ
8 recognized that each medical source “generally limited the claimant to simple work
9 with occasional interaction with the public and coworkers.”⁸⁰ However, contrary to
10 the then controlling regulation, the ALJ did not articulate what weight he gave
11 these reviewing opinions.⁸¹ This was error.

12 The Commissioner argues that by limiting Plaintiff to “simple instructions”
13 and “simple workplace judgment with occasional changes in the work environment”
14 with “occasional coworker interaction with occasional or less interaction or contact
15 with the public” it is clear that the ALJ found these opinions supported by and
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17 ⁷⁹ *Id.*; see also *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

18 ⁸⁰ AR 1611.

19 ⁸¹ 20 C.F.R. § 416.927(c) (“Regardless of its source, we will evaluate every medical
20 opinion we receive. Unless we give a treating source’s medical opinion controlling
21 weight under paragraph (c)(2) of this section, we consider all of the following
22 factors in deciding the weight we give to any medical opinion.”).

1 consistent with the record.⁸² However, it is the ALJ's responsibility to explain how
2 he considered the relevant factors in deciding what weight to give to the medical
3 opinions. Not only did the ALJ fail to assign a weight to these opinions but the ALJ
4 failed to consider the relevant factors, including whether these reviewing opinions
5 were supported or consistent with the objective medical record and other
6 opinions.⁸³

7 Furthermore, the ALJ did not compare Dr. Eisenhauer's June 2020
8 reviewing opinion against her more limiting opinion issued later in November
9 2021.⁸⁴ In her June 2020 opinion for Disability Determination reconsideration
10 purposes, Dr. Eisenhauer reviewed the then-available record and opined that
11 Plaintiff was moderately limited in her abilities to understand, remember, or apply
12 information; interact with others; and concentrate, persist, or maintain pace; and
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15 ⁸² AR 1603.

16 ⁸³ *See Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
17 review is constrained to the reasons the ALJ gave).

18 ⁸⁴ It is possible that Renee Eisenhauer, PhD, who issued the June 2020 reviewing
19 opinion is a different individual than R. Renee Eisenhauer, PhD, who issued the
20 November 2021 reviewing opinion. Neither party discussed this issue. Regardless,
21 the ALJ must evaluate each medical opinion against the relevant factors. The ALJ
22 failed to do so here for Dr. Eisenhauer's June 2020 opinion.
23

1 mildly limited in her ability to adapt or manage herself.⁸⁵ She found that Plaintiff
2 would be able to “understand and recall simple work tasks but would have
3 difficulty with more complex tasks,” was “able to sustain simple and repetitive
4 work tasks for 2-hr increments of time [with] regular breaks during a normal 8-hr
5 workday . . . [and] would do best working away from others,” and was “able to
6 interact appropriately with the public and coworkers when interactions are
7 infrequent, routine, and superficial . . . [and] able to interact with a supervisor to
8 ask and accept simple instructions.”⁸⁶ Then on November 9, 2021, Dr. Eisenhauer
9 issued an opinion for State disability purposes after reviewing Dr. Genthe’s
10 November 2021 opinion, Dr. Bowes’ November 2018 opinion, and Dr. Cline’s
11 January 2017 opinion.⁸⁷ Dr. Eisenhauer agreed with Dr. Genthe’s opinion that
12 Plaintiff’s abilities to communicate and perform effectively in a work setting,
13 maintain appropriate behavior in a work setting, and complete a normal workday
14 and workweek without interruptions from psychologically based symptoms were
15 markedly limited.

16 As mentioned above, the ALJ did not specify how much weight was given to
17 Dr. Eisenhauer’s initial June 2020 opinion but did craft an RFC fairly consistent
18 therewith. As to Dr. Eisenhauer’s November 2021, the ALJ gave it “no weight.” In
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20 ⁸⁵ AR 861–76.

21 ⁸⁶ AR 861–76.

22 ⁸⁷ AR 2176–2207.

1 doing so, the ALJ did not mention that Dr. Eisenhower authored this opinion,
2 instead the ALJ merely referred to it as a “DSHS reviewer opinion.”⁸⁸ The ALJ
3 explained he gave no weight to the “DSHS reviewer opinion” “for the same reasons
4 no weight is given to the examiner’s opinion[]” by Dr. Genthe.⁸⁹

5 The ALJ consequentially erred by not discussing why Dr. Eisenhower’s
6 initial less restrictive opined limitations should be given more weight than the
7 subsequently authored more restrictive opined limitations, which were given no
8 weight.⁹⁰ Moreover, as is discussed below, the reasons given by the ALJ for
9 discounting Dr. Eisenhower’s November 2021 opinion are not specific and
10 legitimate reasons supported by substantial evidence.

11 3. Psychological evaluations and opinions resulting therefrom

12 a. Dr. Zhang

13 In July 2016, Dr. Zhang conducted a psychological evaluation, which
14 included reviewing the disability report and provided medical records, a clinical
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18 ⁸⁸ AR 1614.

19 ⁸⁹ *Id.*

20 ⁹⁰ See *Lingenfelter*, 504 F.3d at 1042 (recognizing that the ALJ is to consider the
21 consistency of the medical opinion with the record as a whole and assess the
22 amount of relevant evidence that supports the opinion).
23

1 interview, and a mental status examination.⁹¹ During the clinical interview,
2 Plaintiff shared that she was sexually abused as a child, is divorced, has few
3 friends, and socializes occasionally. Dr. Zhang noted that Plaintiff's grooming and
4 hygiene were fair, she was reasonably cooperative and orientated, her mood was
5 mildly anxious and depressed with constricted affect, her speech was clear, she was
6 able to do simple calculations, she had difficulty with abstract thinking, and she
7 showed fair judgment but poor insight. Dr. Zhang diagnosed Plaintiff with
8 dependent personality disorder, including poor coping skills, and her prognosis was
9 guarded. He opined that Plaintiff had moderate limitations with understanding,
10 remembering, and carrying out detailed and complex instructions; maintaining
11 consistent attendance and performing routine work duties; performing work
12 without special or additional supervision; and responding appropriately to usual
13 work situations and to changes in a routine work setting. He opined that Plaintiff
14 was not capable of managing funds independently.

15 The ALJ gave Dr. Zhang's opinion no weight because it was not supported by
16 the "limited review of the records with single examination," was not well-
17 explained or defined, and was inconsistent with Plaintiff's mental-health treatment
18 and medication compliance and lack of psychiatric care.⁹² Because Dr. Zhang's
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20 ⁹¹ AR 417–21. Dr. Zhang's report does not specify what the "medical records as
21 provided" were that he reviewed. AR 417.

22 ⁹² AR 1615.
23

1 opined moderate limitations were inconsistent with Jay Toews, EdD’s testifying
2 opinion, the ALJ was required to give specific and legitimate reasons, supported by
3 substantial evidence, to reject the opinion.⁹³

4 Inconsistency with the mental-status observations by the evaluator or with
5 the longitudinal record, as well as lack of support from the record, are legitimate
6 reasons for an ALJ to discount a medical opinion.⁹⁴ The ALJ must explain why the
7 observations and findings in the evaluation report and other aspects of the record
8 are inconsistent with the opined limitations.⁹⁵

9 Based on a fair and full review of the longitudinal medical record, the ALJ’s
10 decision to give no weight to Dr. Zhang’s opined moderate limitations is not
11 supported by such relevant evidence that a reasonable mind would accept the no-
12 weight decision as adequate. The ALJ relied too heavily on the normal mental-
13 health observations during physical-health appointments without considering that

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15 ⁹³ See *Bayliss*, 427 F.3d 1216.

16 ⁹⁴ 20 C.F.R. § 416.920c(b)(2), (c). See *Buck*, 869 F.3d at 1050; *Lingenfelter*, 504 F.3d
17 at 1042 (recognizing that the ALJ is to consider the consistency of the medical
18 opinion with the record as a whole and assess the amount of relevant evidence that
19 supports the opinion).

20 ⁹⁵ See *Burnett v. Bowen*, 930 F.3d 731, 736 (7th Cir. 1987); *Humane Soc. of U.S. v.*
21 *Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010 (requiring an agency to provide an
22 explanation that “enables meaningful judicial review”).

1 Plaintiff often appeared in mild pain, as depressed, or as anxious during therapy
2 and medication-management appointments and that all of the evaluating mental-
3 health professionals opined that Plaintiff would have difficulty maintaining
4 consistent attendance and performing work tasks consistently within a schedule.⁹⁶
5 Moreover, although the ALJ appropriately considered that Dr. Zhang reviewed
6 review prior medical records, the ALJ should not have discounted Dr. Zhang's
7 report on the grounds that he only had a "limited review of records with single
8 examination" because under the then-applicable regulation more weight, not less,

10 ⁹⁶ See, e.g., the evaluating psychological opinions: AR 468–73, 434–38, 1085–89,
11 2168–75. See, e.g., a sampling of mental-health and pain-related treatment records:
12 AR 415 (July 5, 2016: inappropriate mood and affect and appeared depressed); AR
13 603 (Jan. 12, 2017: depressed affect); AR 531 (Apr. 13, 2017: tearful during
14 session); AR 522–23 (Aug. 9, 2017: anxious mood, attention and concentration were
15 impaired as exhibited by distracted, tangential thought form, and fair insight and
16 judgment); AR 511–12 (Nov. 14, 2017: attention and concentration were impaired
17 as exhibited by scattered, thought form tangential, and fair insight and judgment);
18 AR 1370 (July 19, 2019: sad mood); AR 1302 (Feb. 19, 2020: sad and worried); AR
19 1432 (Feb. 9, 2021: anxious, sad, tearful, and fair judgment and insight). See
20 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (disallowing the ALJ from
21 cherry picking evidence to support a conclusion that contradicts the overall
22 diagnostic record).

1 was to be given to opinions from a “source who has examined [the claimant] than to
2 the medical opinion of a medical source who has not examined [the claimant].”⁹⁷
3 Plus, while an evaluating opinion, which was based on information or observations
4 that were not consistent with the longitudinal record, may be appropriately
5 discounted; here, a full review of the longitudinal record reflects that Dr. Zhang’s
6 observations and findings were largely consistent with the waxing and waning
7 mental-health symptoms observed by Plaintiff’s mental-health treating providers
8 and evaluators.

9 Finally, the ALJ discounted Dr. Zhang’s opinion because Plaintiff had
10 “inconsistent mental health treatment and lack of psychiatric care with
11 inconsistent use of psychotropic medication.”⁹⁸ The longitudinal record shows that
12 a variety of medications were tried, some of which caused side effects, and that
13 notwithstanding such medication attempts she still experienced sadness, anxiety,
14 and panic attacks.⁹⁹ For about two years from mid-2018–2020, Plaintiff’s medical
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17 ⁹⁷ 20 C.F.R. § 416.927(c)(1).

18 ⁹⁸ AR 1615.

19 ⁹⁹ *See, e.g.*, AR 510, 514, 518, 522, 526, 653, 1251, 1259, 1427, 1430–31, 2038, 2049,
20 2058, 2061, 2664. *See Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014)

21 (“Cycles of improvement and debilitating symptoms are a common occurrence, and
22 in such circumstances it is error for an ALJ to pick out a few isolated instances of
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1 care was largely for pain management rather than mental-health appointments;
2 however, the ALJ failed to consider the suspected interplay between Plaintiff's pain
3 and her mental-health impairments.¹⁰⁰ In addition, the ALJ did not discuss how
4 Plaintiff's mental-health impairments, including anxiety about leaving her house,
5 affected her course of treatment, particularly prior to the increased availability of
6 healthcare by telephone or video during and after the national pandemic in
7 2020.¹⁰¹

8 On this record, the ALJ erred by giving no weight to Dr. Zhang's opinion.

9 *b. Dr. Cline and Dr. Carstens*

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11

12

13 improvement over a period of months or years and to treat them as a basis for
14 concluding a claimant is capable of working.”).

15 ¹⁰⁰ See, e.g., AR 454–57, 470, 1087. See *Lester v. Chater*, 81 F.3d 821, 829–30 (9th
16 Cir. 1995) (superseded by statute on other grounds) (noting that, for claimant with
17 chronic pain syndrome and affective disorder, the consequences of the physical and
18 mental impairments were inextricably linked and the Commissioner “erred as a
19 matter of law in isolating the effects of [the claimant’s] physical impairment from
20 the effects of his mental impairment”).

21 ¹⁰¹ See, e.g., AR 2109 (setting a goal in therapy of leaving her room for 5 minutes
22 daily to talk with her family).

23

1 Six months after Dr. Zhang's evaluation, Plaintiff was evaluated by
2 Dr. Cline.¹⁰² This psychological evaluation again included a clinical interview and
3 mental status examination. Plaintiff shared that she isolates by staying in her
4 room, feels depressed every day, is preoccupied with fears of being abandoned in
5 relationships, and that her physical pain increased following a car accident years
6 prior.¹⁰³ Dr. Cline stated, "she endorses many traits consistent with a diagnosis of
7 borderline personality disorder, and this may be the best diagnosis for her at this
8 time, though she appears to have had significant episodes of depression in the past
9 these may have been strongly influenced by her substance use."¹⁰⁴ Dr. Cline
10 observed that Plaintiff was casually attired and groomed, her speech was within
11 normal limits, she was cooperative and orientated with fair eye contact, her mood
12 was described as "tired, ho-hum," and her affect was slightly flattened. Dr. Cline
13 noted that Plaintiff's fund of knowledge and thought process/content were not
14 within normal limits, her perception was not within normal limits as she
15 sometimes hears voices, her ability to think abstractly was limited at best, her
16 primary thinking pattern was concrete, her insight appeared minimal, and her
17 judgment was basic. The Rey testing score was 14, which indicated an above
18 average level of effort and cooperation and decreased the likelihood of malingering.

20 ¹⁰² AR 468–73.

21 ¹⁰³ AR 468; *see also* AR 576.

22 ¹⁰⁴ AR 468.

1 Her Becks Anxiety Inventory score of 40 indicated marked level of anxiety, and her
2 score of 54 on the Becks Depression Inventory-II fell in the uninterpretable range,
3 as scores above 50 are generally viewed as past the cut-off for severe symptoms of
4 depression, indicating either exaggeration or a cry for help. Dr. Cline concluded,
5 “Given her apparent personality disorder and the lack of malingering on the Rey,
6 the latter [a cry for help] appears to be the best interpretation at this time.”¹⁰⁵ In
7 addition to borderline personality disorder, Dr. Cline diagnosed Plaintiff with
8 PTSD, unspecified anxiety disorder with features of agoraphobia and panic
9 disorder (rule-out substance induced/exacerbated), unspecified depressive disorder
10 (rule-out MDD in remission vs. substance induced/exacerbated), rule-out somatic
11 symptom disorder, and substance abuse disorders in remission except for
12 marijuana use. He opined that Plaintiff was markedly limited in her abilities to
13 maintain appropriate behavior in a work setting and set realistic goals and plan
14 independently; and moderately limited in her abilities to make simple work-related
15 decisions, be aware of normal hazards and take appropriate precautions,
16 communicate and perform effectively in a work setting, complete a normal workday
17 and workweek without interruptions from psychologically based symptoms, and
18 perform activities within a schedule, maintain regular attendance, and be punctual
19 within customary tolerances without special supervision.

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22 ¹⁰⁵ AR 470.

1 Dr. Carstens reviewed Dr. Cline's opinion, along with a December 15, 2016
2 treatment note.¹⁰⁶ Dr. Carstens agreed with Dr. Cline's functional limitations but
3 recommended a duration of 18-24 months for the number of months the
4 impairments were expected to persist, instead of Dr. Cline's opined duration of 9-12
5 months.

6 The ALJ gave no weight to Dr. Cline's opinion because 1) Dr. Cline reviewed
7 no records, 2) he did not explain why the profound limitations were assessed, 3) he
8 was essentially finding that Plaintiff could not work which is a legal conclusion, 4)
9 his extreme limitations were inconsistent with his mental-status examination
10 findings, 5) his moderate and marked limitations were inconsistent with most
11 treatment notes, and 6) the severe limitations were inconsistent with Plaintiff's
12 ability to "initiate her own treatment, drive a vehicle, care for her grandson, and
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15 ¹⁰⁶ AR 474–75. The December 2016 treatment record was authored by ARNP Beth
16 McManis, who became one of Plaintiff's treating providers. The December
17 appointment was to establish care with ARNP McManis after Plaintiff had moved.
18 ARNP McManis noted that she observed Plaintiff with a limping and shuffling
19 gait, with decreased sensation to pinprick in legs, and teariness. AR 463–66. ARNP
20 McManis prescribed medication to help Plaintiff sleep and referred Plaintiff to a
21 therapist for her depression and anxiety and to a pain management provider for
22 her pain.
23

1 apply coping skills.”¹⁰⁷ Likewise, the ALJ gave no weight to Dr. Carstens’ medical
2 opinion because it was “based largely upon the cursory examination report [of Dr.
3 Cline’s] for the purpose of support eligibility for state disability assistance.”¹⁰⁸

4 Because Dr. Cline’s and Dr. Carstens’ opined limitations were inconsistent
5 with Dr. Toews’ reviewing opinion, the ALJ was required to give specific and
6 legitimate reasons, supported by substantial evidence, to reject their opinions.¹⁰⁹

7 First, as is explained above, simply because Dr. Cline did not review records
8 as part of his psychological examination is not a basis for the ALJ to reject the
9 opinion, particularly given that Dr. Cline’s observations and opined limitations
10 were generally consistent with the other psychological examinations.

11 Second, similar to Dr. Zhang, Dr. Cline heard from Plaintiff as to her
12 background and her daily activities; he considered Plaintiff’s high BAI scores; he
13 observed that Plaintiff’s affect was slightly flattened; and he found her ability to
14 think abstractly was limited, her thinking pattern concrete, and insight minimal.
15 Instead of looking at these observations and findings by Dr. Cline, the ALJ found
16 that “Dr. Cline did not provide specific rationale to explain” his assessments. This
17 finding is not supported by substantial evidence. Although an ALJ need not
18 address every piece of evidence, an ALJ “may not ignore significant probative
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20 ¹⁰⁷ AR 1613.

21 ¹⁰⁸ AR 1614.

22 ¹⁰⁹ *See Bayliss*, 427 F.3d 1216.
23

1 evidence that bears on the disability analysis.”¹¹⁰ Here, the ALJ ignored significant
2 probative evidence supporting Dr. Cline’s opined limitations.

3 Third, it was not legitimate for the ALJ to discount Dr. Cline’s opinion on
4 the grounds that it was essentially a legal conclusion that Plaintiff cannot work.
5 One’s ability to perform the mental demands of work activities including
6 maintaining appropriate workplace behavior, concentration, persistence, or pace
7 must be considered by the ALJ—and a medical source’s opinion on these abilities is
8 relevant evidence that the ALJ must consider.¹¹¹ Dr. Cline’s evaluation and opined
9 limitations offer more than simply a statement as to whether Plaintiff was able to
10 perform regular or continuing work.¹¹² This was not an adequate basis to discount
11 Dr. Cline’s opined limitations.

12 Finally, although a ALJ may discount a medical opinion that is inconsistent
13 with the claimant’s level of activity,¹¹³ the ALJ’s finding that Dr. Cline’s opined
14 limitations were inconsistent with Plaintiff’s ability to “initiate her own treatment,
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16 ¹¹⁰ *Kilpatrick*, 35 F.4th at 1193.

17 ¹¹¹ 20 C.F.R. §§ 416.913(a)(2)(i)(B), 416.927(a)(1).

18 ¹¹² 20 C.F.R. § 416.920b(c)(3).

19 ¹¹³ *Id.* § 416.920c(c)(2) (comparing the medical opinion with evidence from
20 nonmedical sources); *see also Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.
21 2001) (finding claimant ability to care for two young children and maintaining a
22 household inconsistent with the medical source’s opinion).

1 drive a vehicle, care for her grandson, and apply coping skills” is not supported by
2 substantial evidence. On this record, a reasonable mind would not consider
3 Plaintiff’s actions in these areas as inconsistent with Dr. Cline’s opined limitations
4 or as activities that are “easily transferable to what may be the more grueling
5 environment of the workplace.”¹¹⁴ The information relayed by Plaintiff during the
6 psychological evaluations and to her treating providers reflect that she spent the
7 majority of her days isolated in her room.¹¹⁵ In fact, one goal of therapy was for her
8 to spend five minutes outside of her room and interact with her family inside the
9 home; another goal was that she appear for her next appointment in person in
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12 ¹¹⁴ See *Diedrich v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017) (recognizing that the
13 fact the claimant “could participate in some daily activities does not contradict the
14 evidence of otherwise severe problems that she encountered in her daily life during
15 the relevant period”); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

16 ¹¹⁵ See, e.g., AR 1073 (“I isolate myself, I don’t want to be around anyone, I cry, I
17 get angry, it depends on the day.”); AR 1422 (“always laying down in her room”);
18 AR 1430 (“will walk into another room so her grandson does not see her having
19 difficulty with PTSD/anxiety sx”); AR 2104 (“Notes very difficult conversation with
20 dtr in law and son in which they are coaxing her to come out of room more—finds it
21 frustrating that they do not want to let her stay in her room all the time where she
22 feels safest”).
23

1 order to “expand where your brain says is ‘safe, if stressful.’”¹¹⁶ Notwithstanding
2 this isolation, she was able to contact providers by telephone or by email.¹¹⁷ In
3 addition, the statements about Plaintiff caring for her grandson must be
4 interpreted in context.¹¹⁸ Although there is a reference that she will be doing some
5 of the care for her grandson when her son starts school,¹¹⁹ there is no indication in
6 the record that this occurred or that Plaintiff provided any care to the grandson
7 that was of sufficient duration or type to be inconsistent with the opined
8 limitations. Instead, the references to her grandson are that she liked to play with
9 him and get him to talk. Finally, on this record, that Plaintiff has a driver’s license
10 and used to drive to appointments or errands is not an activity that it is

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12 ¹¹⁶ AR 2110, 2544.

13 ¹¹⁷ *See, e.g.*, AR 2821–22.

14 ¹¹⁸ *See, e.g.*, AR 2109–10 (“Notice it can be challenging for me to spend so much
15 time with my grandson, but it’s important to me and I’m proud of myself for doing
16 it” but also mentioning that she “[h]as been pushing herself a little bit to leave her
17 room each day to talk to her son and daughter in law—notes that after 5 or 6
18 minutes it becomes very anxiety provoking”); AR 2111 (reporting that she lives
19 with her son, daughter-in-law, and 3½-year-old grandson, that she “loves working
20 with Mathias to get him to talk” and that she tries to play with her grandson but it
21 is difficult due to her pain).

22 ¹¹⁹ AR 1422.

1 inconsistent with the opined limitations; moreover, Plaintiff testified that she
2 stopped driving herself and relied on others.¹²⁰

3 As to Dr. Carstens' opinion, the ALJ no weight to Dr. Carstens' opinion
4 because it was based on Dr. Cline's opinion and issued for the purpose of
5 supporting eligibility for state disability assistance. As is discussed above, the ALJ
6 failed to give specific and legitimate reasons, supported by substantial evidence, for
7 giving no weight to Dr. Cline's opinion. In addition, Washington's assistance
8 requirements rely on the Social Security five-step analytic framework; therefore,
9 that the opinion was issued for State assistance purposes is not a legitimate reason
10 to give no weight to Dr. Carstens' opinion.¹²¹

11 On this record, the ALJ erred by giving no weight to Dr. Cline's and
12 Dr. Carstens' opinions.

13 4. Dr. Bowes

14 Almost two years after Dr. Cline's evaluation, Dr. Bowes evaluated Plaintiff
15 in November 2018, including conducting a clinical interview, a mental status
16

17 ¹²⁰ AR 1644; *see also* AR 1963, 2821, 2834.

18 ¹²¹ *See* 20 C.F.R. § 416.927(b), 416.913(a)(2) (requiring an ALJ to evaluate each
19 medical source opinion and consider the supporting evidence underlying the
20 decision); WAC 182-512-0050; *Holbrook v. Berryhill*, No. 15-35552, 696 F. App'x
21 846 (9th Cir. Aug. 30, 2017) (unpublished opinion) (reversing the ALJ for failing to
22 adequately consider a Washington DSHS decision finding the claimant disabled).
23

1 examination, and testing.¹²² During the clinical interview, Plaintiff shared that she
2 was neglected and sexually abused as a child, married three times, has been in
3 abusive relationships, lives with her adult son, has occasional nightmares and
4 intrusive memories, experiences hypervigilance, has no energy, is always tired, has
5 chronic pain, and spends most of her time in bed trying to sleep. The test results
6 were: Trails A, 17; Trails B, 57; Rey-1, 15; Beck Depression Inventory 46 (severe);
7 and Becks Anxiety Inventory 42 (severe).¹²³ Dr. Bowes noted that Plaintiff's basic
8 grooming was marginal, she was cooperative but had low energy with dysphoric
9 mood and blunted affect, her thought process was logical, and she was orientated
10 with normal fund of knowledge, concentration, and insight. Dr. Bowes diagnosed
11 Plaintiff with persistent depressive disorder (chronic major depression, severe),
12 PTSD, and rule-out somatic disorder. She assessed that Plaintiff was severely
13 limited in her abilities to: perform activities within a schedule, maintain regular
14 attendance, and be punctual within customary tolerances without special
15 supervision; and markedly limited in her abilities to communicate and perform
16 effectively in a work setting, maintain appropriate behavior in a work setting,
17 complete a normal workday and workweek without interruptions from
18 psychologically based symptoms, and understand, remember, and persist in tasks
19 by following detailed instructions. She also opined that Plaintiff was moderately
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21 ¹²² AR 1085–96.

22 ¹²³ AR 1086–87.

1 limited in her abilities to learn new tasks, perform routine tasks without special
2 supervision, adapt to changes in a routine work setting, ask simple questions or
3 request assistance, and set realistic goals and plan independently.

4 The ALJ gave no weight to Dr. Bowes' opinion because Dr. Bowes 1)
5 reviewed no records, 2) she did not explain her opined severe limitations, 3) her
6 opinion was a legal conclusion that Plaintiff could not work, 4) the opined
7 limitations were internally inconsistent with the normal mental status findings, 5)
8 the opined limitations were inconsistent with the medical record, and 6) the
9 opinion was inconsistent with Plaintiff's ability to "initiate her own treatment,
10 drive a vehicle, care for her grandson, and apply coping skills."¹²⁴ Because Dr.
11 Bowes' opined moderate limitations were inconsistent with Dr. Toews' testifying
12 opinion, the ALJ was required to give specific and legitimate reasons, supported by
13 substantial evidence, to reject the opinion.¹²⁵ The ALJ failed to do so.

14 First, as is explained above, the relied-on activities do not serve as
15 substantial evidence to discount the opined limitations, Dr. Bowes' opined
16 limitations were not "legal conclusions" that could be discounted but instead were
17 medical-source evidence that the ALJ was required to evaluate, and the ALJ was
18 generally required to give more weight, not less weight, to a psychological
19 examination than to a reviewing opinion. Therefore, these reasons were not specific
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21 ¹²⁴ AR 1614.

22 ¹²⁵ See *Bayliss*, 427 F.3d 1216.

1 and legitimate reasons, supported by substantial evidence, to give no weight to Dr.
2 Bowes' opinion,

3 Second, the ALJ's finding that Dr. Bowes did not explain her assessments is
4 not supported by substantial evidence. Dr. Bowes observed Plaintiff as dysphoric
5 and with marginal grooming, a blunted affect, low energy, and high scores on the
6 Beck Depression and Anxiety Inventories. Likewise, the ALJ's finding that
7 Dr. Bowes' opinion is internally inconsistent with the normal mental status
8 findings is not supported by substantial evidence. Finally, as is explained above,
9 the ALJ failed to consider fairly and fully that the each of the psychological
10 evaluations concluded that Plaintiff was at least moderately limited in maintaining
11 attendance and sustaining work performance, or that the treatment notes from
12 behavioral health, therapy, and pain management appointments generally
13 reflected that Plaintiff presented with an abnormal affect or mood or in mild pain.

14 For these reasons, the ALJ's finding that Dr. Bowes' opinion was entitled to
15 no weight is not supported by substantial evidence.

16 5. Dr. Genthe and Dr. Eisenhauer

17 In November 2021, three years after Dr. Bowes' psychological evaluation,
18 Dr. Genthe conducted a psychological evaluation, which included a clinical
19 interview and mental status examination.¹²⁶ Plaintiff relayed that she lives with
20 her son, relies on others for transportation, can get along with others on a
21

22 ¹²⁶ AR 2168–75.
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1 superficial basis but has difficulties trusting people, spends her day watching TV,
2 and can care for her hygiene needs, prepare her own meals, and schedule her own
3 appointments. Dr. Genthe diagnosed her with major depressive disorder with
4 anxious distress, panic disorder, PTSD, and other specified personality disorder
5 (rule-out). Dr. Genthe opined that Plaintiff was moderately limited in her abilities
6 to learn new tasks; adapt to changes in a routine work setting; be aware of normal
7 hazards and take appropriate precautions; ask simple questions or request
8 assistance; set realistic goals and plan independently; perform activities within a
9 schedule, maintain regular attendance, and be punctual within customary
10 tolerances without special supervision; and understand, remember, and persist in
11 tasks by following detailed instructions. Dr. Genthe opined that Plaintiff was
12 markedly limited in her abilities to communicate and perform effectively in a work
13 setting, maintain appropriate behavior in a work setting, and complete a normal
14 workday and workweek without interruptions from psychologically based
15 symptoms. Dr. Genthe stated that “[d]espite having taken prescribed medication
16 for some time, her current regimen does not appear to be adequately targeting
17 interfering symptoms, which are likely to interfere with her ability to initiate or
18 maintain future employment.”¹²⁷

22 ¹²⁷ AR 2172.

1 Dr. Eisenhower reviewed Dr. Genthe's report, as well as the reports from
2 Dr. Bowes and Dr. Cline.¹²⁸ She agreed with Dr. Genthe's diagnoses and the opined
3 functional limitations.

4 The ALJ gave little weight to Dr. Genthe's opinion because 1) it was
5 inconsistent with his opinion that vocational training would minimize or eliminate
6 barriers, 2) Plaintiff's symptoms could be minimized by more targeted medication,
7 3) Dr. Genthe's examination was limited to the phone with no review of records,
8 and 4) Plaintiff's memory testing and judgment findings are not consistent with the
9 treating observations of record.¹²⁹ The ALJ gave no weight to Dr. Eisenhower's
10 November 2021 opinion because it was based largely on Dr. Genthe's "cursory
11 examination report[] for the purpose of support eligibility for state disability
12 assistance."¹³⁰

13 Because Dr. Bowes' opined moderate limitations were inconsistent with
14 Dr. Toews' testifying opinion, the ALJ was required to give specific and legitimate
15 reasons, supported by substantial evidence, to reject the opinion.¹³¹ The ALJ failed
16 to do so.

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19 ¹²⁸ AR 2206–07.

20 ¹²⁹ AR 1615–16.

21 ¹³⁰ AR 1614.

22 ¹³¹ *See Bayliss*, 427 F.3d 1216.
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1 First, as is explained above, the ALJ failed to consider fairly and fully the
2 consistency between Plaintiff's test results during the psychological evaluations
3 and the observations of the evaluators against the longitudinal mental-health and
4 pain-management medical record. Second, it was error for the ALJ to discount
5 Dr. Genthe's evaluation for being by telephone and for not including review of
6 records because 1) the then-applicable regulation generally required giving more
7 weight, not less weight, to examination opinions than to reviewing opinions, and 2)
8 the ALJ did not consider that Dr. Eisenhower, who had reviewed the record in June
9 2020, also reviewed Dr. Genthe's report and found it supported by Dr. Clines' and
10 Dr. Bowes' reports.

11 Third, the ALJ also should not have discounted Dr. Genthe's opinion on the
12 grounds that he suggested that Plaintiff's current medications were not adequately
13 targeting interfering symptoms without considering Dr. Genthe's statement in full
14 context and that the medical record reflected that providers had worked with
15 Plaintiff for several years in an attempt to find the best medication to minimize her
16 mental-health symptoms, pain, and medication side-effects.¹³² Dr. Genthe stated:

17 *Despite having taken prescribed medication for some time, her current*
18 *regimen does not appear to be adequately targeting interfering*
19 *symptoms, which are likely to interfere with her ability to initiate or*
20 *maintain future employment. It is recommended that she continue*
working with her treatment providers in an effort to fine-tune her
medication regimen for effectiveness. Additionally, continued

21 ¹³² See, e.g., AR 463–67; 653–57, 673–78, 517, 522–26, 1130, 1387, 1355, 2031, 2111–
22 13, 2498.

1 involvement in mental health counseling is recommended to address
2 various psychosocial stressors that contribute to her current level of
emotional distress.¹³³

3 Dr. Genthe also recommended that Plaintiff needed a period of at least twelve
4 months to address her treatment needs “at least moderately well.”¹³⁴

5 Finally, the ALJ fails to explain why Dr. Genthe’s opinion that vocational
6 training or services would minimize or eliminate barriers to employment was
7 inconsistent with Dr. Genthe’s opined limitations.

8 As to Dr. Eisenhauer’s November 2021 opinion agreeing with Dr. Genthe’s
9 opinion, the ALJ’s rationale for giving this opinion no weight is not supported by
10 specific and legitimate reasons, supported by substantial evidence. First, the ALJ’s
11 finding that Dr. Eisenhauer’s opinion was based “largely upon the cursory
12 examination report[]”¹³⁵ of Dr. Genthe is not supported by substantial evidence, as
13 Dr. Eisenhauer also reviewed Dr. Clines’ and Dr. Bowes’ psychological reports.
14 Moreover, as is discussed above, the ALJ failed to consider that Dr. Eisenhauer
15 (likely) reviewed the record in June 2020 in connection with her prior opinion.
16 Second, as explained above, that Dr. Eisenhauer issued her opinion for the purpose
17 of state disability assistance is not a legitimate reason to give no weight to it.

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20 ¹³³ AR 2172 (emphasis added).

21 ¹³⁴ *Id.*

22 ¹³⁵ AR 1614.

1 6. Summary

2 The ALJ erred in his analysis of the mental-health opinions. Contrary to the
3 Commissioner's argument otherwise, simply because the record contains several
4 normal mental-health findings does not equate to a finding that the ALJ's
5 nondisability decision is supported by substantial evidence. The ALJ has a duty to
6 evaluate the evidence of record fully and fairly. By relying too heavily on the
7 normal mental-health findings, the ALJ failed to consider how Plaintiff's mental-
8 health impairments and pain impact her mood and energy and abilities to
9 maintain attendance and complete a workday/week. This error in turn effected the
10 ALJ's assessment of the evaluating psychological opinions. This error was
11 consequential as the vocational expert testified that one's work absences cannot
12 exceed 6–8 days a year.¹³⁶

13 **C. Other Challenges**

14 Because of the ALJ's above-discussed consequential errors, the Court need
15 not analyze Plaintiff's remaining claims pertaining to other medical opinions or the
16 ALJ's discounting of Plaintiff's symptom reports.

17 **D. Remand: award benefits.**

18 Plaintiff asks for an award of benefits. Although remand for further
19 administrative proceedings is the usual course when a harmful error occurs in the
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23 ¹³⁶ AR 1654.

1 administrative proceeding, this is a rare circumstance where an award of benefits
2 is appropriate.¹³⁷

3 First, for the third time, an ALJ failed to provide legally sufficient reasons
4 supported by substantial evidence for the disability denial.

5 Second, further administrative proceedings will offer no benefit—the record
6 is fully developed.¹³⁸ This record supports applying the credit-as-true rule as a
7 prophylactic measure.¹³⁹ Plaintiff filed her initial claim in March 2016. Not only
8 have eight years passed since Plaintiff's application, but now for the third time, the
9 ALJ failed to consider fully and fairly the longitudinal medical record, failed to
10 provide specific and legitimate reasons for why the more limiting medical opinions
11 were discounted, and failed to include limitations related to COPD or Plaintiff's
12 lower leg impairments—limitations that likely would have precluded a light-work
13 RFC. "Allowing the Commissioner to decide the issue again would create an unfair
14 'heads we win; tails, let's play again' system of disability benefits adjudication."¹⁴⁰

15 Third, when fully crediting the evaluating medical opinions pertaining to
16 Plaintiff's mental health, as well as the treating medical opinions, the vocational
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18 ¹³⁷ See *Treichler v. Comm'r of Social Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir.
19 2014) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

20 ¹³⁸ See *id.*

21 ¹³⁹ See *Vasquez v. Astrue*, 572 F.3d 586, 593-94 (9th Cir. 2009).

22 ¹⁴⁰ *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004).

expert's testimony requires a finding that Plaintiff is disabled.¹⁴¹ Plaintiff is unable to perform and sustain fulltime work.

An award of benefits is warranted.

IV. Conclusion

Plaintiff establishes the ALJ erred and that an award of benefits—rather than a third remand for a fourth re-evaluation—is appropriate.

Accordingly, **IT IS HEREBY ORDERED:**

1. The ALJ's nondisability decision is **REVERSED**, and this matter is **REMANDED to the Commissioner of Social Security for immediate calculation and award of benefits.**

2. The Clerk's Office shall **TERM** the parties' briefs, **ECF Nos. 10 and 12**, enter **JUDGMENT** in favor of **Plaintiff**, and **CLOSE** the case.

IT IS SO ORDERED. The Clerk's Office is directed to file this order and provide copies to all counsel.

DATED this 30th day of July 2024.



EDWARD F. SHEA
Senior United States District Judge

¹⁴¹ AR 1654–60. In addition, if Plaintiff is limited to sedentary work, once she turned 50, she qualified for disability under the Grids.